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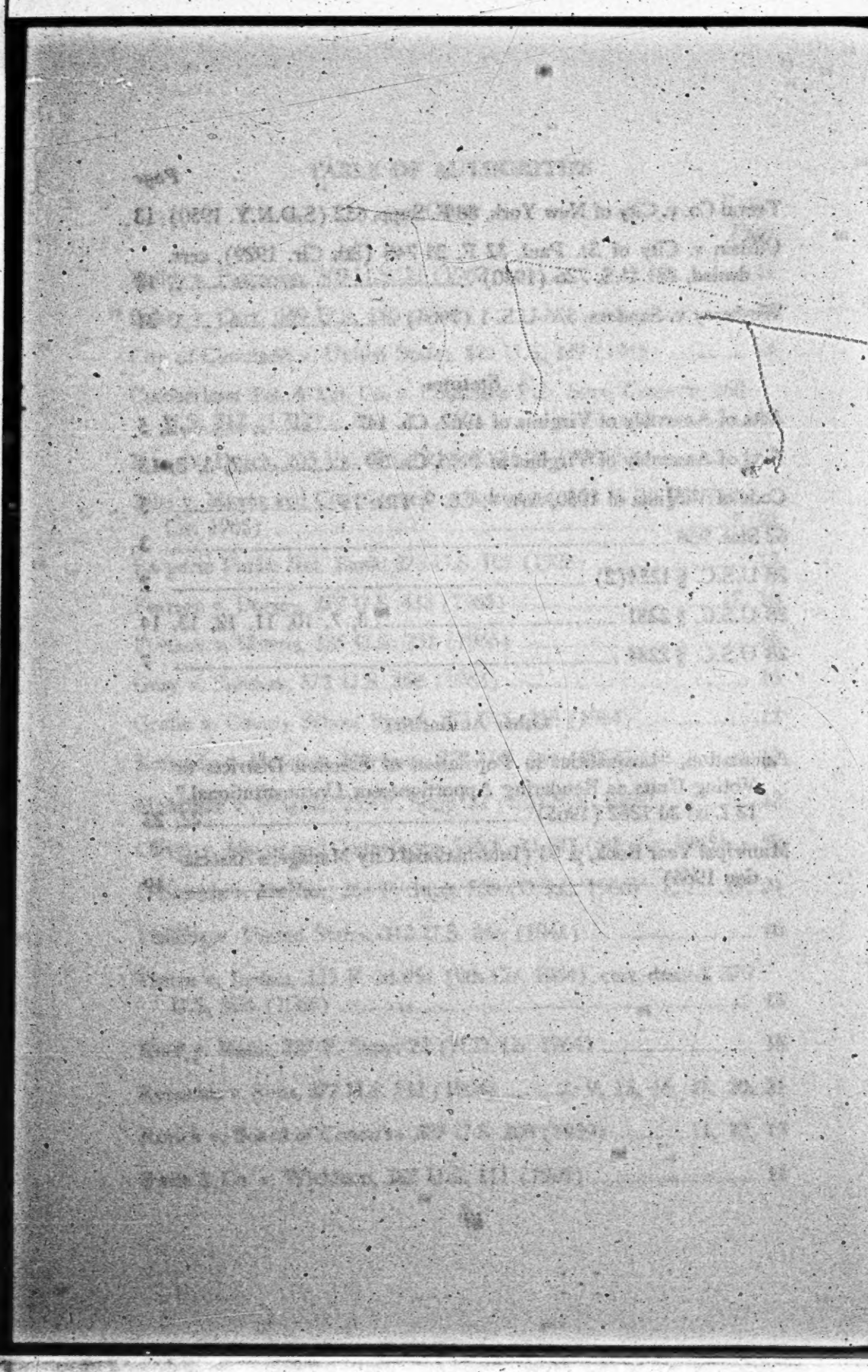

IN THE

Supreme Court of the United States

October Term, 1966

NO. 724

FRANK A. DUSCH, ET AL.,

Appellants,

v.

J. E. CLAYTON DAVIS, ROLLAND D. WINTER, CORNELIUS D. SCULLY AND HOWARD W. MARTIN,

Appellees.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (R. 116-122) is reported at 361 F. 2d 495. The opinion of the United States District Court for the Eastern District of Virginia (R. 105-115), which was reversed by the Court of Appeals, is not reported.

The opinions of the three-judge district court (R. 74-77)

and the one-judge district court (R. 78-82) deciding earlier phases of this case are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1966 (R. 123). Notice of Appeal was filed August 26, 1966 (R. 124-25). By order of Circuit Court Judge Albert V. Bryan, the time for docketing this appeal was extended seven days (R. 126), *i.e.*, to November 1, 1966, and the appeal was docketed on October 26, 1966. By order entered on January 9, 1967, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 127).

The jurisdiction of this Court rests on 28 U.S.C. § 1254(2).

QUESTIONS PRESENTED

(1) Whether a three-judge court should have been convened to consider the constitutionality of the "Seven-Four Plan" prescribed by the Charter of the City of Virginia Beach, Virginia (Ch. 147, Acts of Assembly of 1962, as amended by Ch. 39, Acts of Assembly of 1966) for the election of councilmen of that city.

(2) Whether the doctrine of "one man, one vote," as enunciated in *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and related decisions for apportionment of members of state legislatures also applies to the apportionment of members of a city council among the several boroughs or wards of a city.

(3) If such doctrine does apply, whether the Seven-Four Plan results in such invidious discrimination as to violate the Equal Protection Clause of the Fourteenth Amendment.

STATUTES INVOLVED

The requirements for a three-judge court are set forth in 62 Stat. 968, 28 U.S.C. § 2281:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The Seven-Four Plan for election of councilmen of the City of Virginia Beach, Virginia, is contained in Sections 3.01 and 3.02 of its Charter as amended by Ch. 39, Acts of Assembly of 1966:

> "§ 3.01 COMPOSITION. The City shall be divided into seven boroughs. One of such boroughs shall comprise the city of Virginia Beach as existing immediately preceding the effective date of this charter and shall be known as the borough of Virginia Beach, and the remaining six boroughs shall comprise the six magisterial districts of Princess Anne County as existing immediately preceding the effective date of this charter and shall be known as the boroughs of Bayside, Blackwater, Kempsville, Lynnhaven, Princess Anne (formerly known as Seaboard) and Pungo. The council shall consist of eleven members, one to be elected by the city at large from among the residents of each of the seven boroughs and four to be elected by and from the city at large.
>
> "§ 3.02 ELECTION OF COUNCILMEN. On the second Tuesday in June in 1966 and on the second Tuesday in

June of every fourth year thereafter, there shall be a general election at which the qualified voters of the city shall elect eleven councilmen for terms of four years beginning on the first day of September next following the date of their election and until their successors are duly elected and qualified. Each candidate shall state whether he is running at large or from the borough of his residence, but otherwise, candidates shall be nominated under general law. Election and qualification of councilmen in nineteen hundred sixty-six shall terminate the terms of all incumbent councilmen even though they may have been elected for longer terms."

STATEMENT OF THE CASE

The facts in this case are not in dispute.

The present City of Virginia Beach came into being in 1963 when the former city of the same name, a resort city having an area of 2.4 square miles and a 1960 population of 8,091, consolidated with adjoining Princess Anne County, a county with both rural and urban development and having an area of almost 300 square miles and a 1960 population of 77,121. While the immediate motivating factor for consolidation was the threat of annexation of portions of the former county by the City of Norfolk, the need of the former city to expand its boundaries and the resulting simplification and economy of government were other reasons for consolidation (R. 36). See also *Davis* v. *Dusch*, 205 Va. 676, 139 S.E. 2d 25 (1964).

The consolidation plan called for a borough form of government to include seven boroughs with one borough corresponding to the boundaries of the former city and six boroughs corresponding to the boundaries of the six magisterial districts of the former county. The boroughs are Virginia Beach, Bayside, Blackwater, Kempsville, Lynnhaven, Princess Anne (formerly called Seaboard) and Pungo. Un-

der this plan a higher tax rate could be levied in those areas which desired more services of government than were desired in the city as a whole. For example, the urban borough of Bayside could have and pay for garbage collection without taxing the rural borough of Pungo which had no such need. Providing direct representation of each borough to represent its needs was considered the cornerstone of the plan (R. 37-38).

The former city was governed by a council of five elected at large and the former county by a six man board of supervisors, one elected by and from each magisterial district. The consolidation plan combined these existing systems into an initial council of eleven. This was an interim plan designed to attract the required majority vote in both the former city and county necessary to achieve consolidation and to guarantee that the needs of a new city, half rural and half urban, would be provided for during a period of transition. It was recognized that this system would not satisfy the longer range needs of the city and the plan provided that another system of election be initiated not sooner than 1968 and not later than 1971 (R. 52).

Consolidation was effected pursuant to Article 4, Chapter 9, Title 15, Code of Virginia of 1950 (now Article 4, Chapter 26, Title 15.1). The charter embodied in the plan was approved by the General Assembly of Virginia (Ch. 147, Acts of Assembly of 1962) and consolidation became effective on January 1, 1963. For the charter and the consolidation agreement of which it was a part, see R. 48-73 and R. 40-48.

Two things characterize Virginia Beach today—its explosive growth and its heterogenous physical and economic composition.

Total population increased from 85,218 at the 1960 census to an estimated 118,139 in 1964, an overall increase of

40% in four years, and the trend continues.* The seven boroughs, their sizes and populations are as follows:

Borough	Area—Sq. Mi.	Population 1960	1964 (est.)
Bayside	28	29,048	36,027
Blackwater	34	733	862
Kempsville	36.6	13,900	22,254
Lynnhaven	47	23,731	37,760
Princess Anne	58.6	7,211	7,957
Pungo	94.4	2,504	2,806
Virginia Beach	2.4	8,091	10,473

The three northern boroughs of Bayside, Kempsville and Lynnhaven are primarily urban. Their large residential areas house persons employed in the adjoining City of Norfolk and at the numerous nearby military installations. These boroughs also contain most of the city's commercial and industrial areas as well as its potential for future development of this character. The three southern boroughs of Blackwater, Princess Anne and Pungo are primarily rural and appear destined to remain that way. Agriculture is the dominant industry but substantial areas are also devoted to recreational uses. The borough of Virginia Beach is centered almost entirely around its famous ocean beach and the tourist industry (R. 99-102).

On December 29, 1964, J. E. Clayton Davis, Rolland D. Winter, Cornelius D. Scully and Howard W. Martin, plaintiffs below and appellees here (herein referred to as

* According to figures recently released, Virginia Beach now has an estimated population of 131,860. *Estimate of the Population of the Counties and Cities of Virginia as of July 1, 1966*, Bureau of Population and Economic Research, University of Virginia, Charlottesville, Virginia, October 19, 1966.

"Voters"), filed a complaint (R. 1-11) in the United States District Court against Frank A. Dusch and others, being the members of the council and the electoral board, the commissioner of revenue and the treasurer of Virginia Beach (herein referred to as "Officials"). The complaint sought the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 to declare unconstitutional the charter plan for election of councilmen and to enjoin the holding of elections under that plan, assessing and collecting taxes, selling bonds and appropriating revenues therefrom until a new council be constituted. The two members of the House of Delegates from Virginia Beach were added as defendants by a supplemental complaint (R. 20-21). In their answers to the original and the supplemental complaints (R. 13-16, 21-22). Officials contended that the District Court lacked jurisdiction of the matter, that this was not a proper case for a three-judge court and that all of the requested relief should be denied. The case was heard upon the testimony taken in a former proceeding in the Supreme Court of Appeals of Virginia, *Davis* v. *Dusch*, 205 Va. 676, 139 S.E. 2d 25 (1964), Record No. 5928. The three-judge court on November 9, 1965, ordered its own dissolution on the ground that "the controversy is of a local nature, without statewide significance, and so not within the intendment of 28 U.S.C. 2281" and on the further ground that in view of the recent decision in *Ellis* v. *Mayor and City Council of Baltimore*, 352 F. 2d 123 (4th Cir. 1965), no constitutional issue beyond the jurisdiction of a single district judge was presented (R. 74-77). On December 7, 1965, the district judge to whom the case was referred held that the charter plan was unconstitutional as violating the doctrine of one man, one vote (R. 78-82). Further proceedings were stayed to allow the city an opportunity to seek a charter amendment at

the 1966 session of the state legislature. The city council had previously committed itself to do so anyway (R. 17-19).

The General Assembly of Virginia amended the Virginia Beach city charter on February 23, 1966, to provide for the election of councilmen under the Seven-Four Plan (Ch. 39, Acts of Assembly of 1966). The council numbers eleven as before, all to be elected by the qualified voters throughout the entire city. One must reside in each of the seven boroughs and the remaining four are elected without reference to residence. Each candidate must declare at the time of filing whether he is running for a borough seat or an at-large seat.

The Seven-Four Plan was selected over several other proposals as the best form of government for a unique and heterogenous city during a period of continued growth and transition. Agriculture is still the city's largest industry and three of the seven boroughs are predominantly rural. It was considered essential to insure that persons having a knowledge of the rural problems which had such an impact on a substantial portion of the city's area and economy would sit on the council. While it was felt that traditional at-large elections would come in time, the Seven-Four Plan was considered best for the city's present needs while still giving all qualified voters the same opportunity to vote for all councilmen (R. 93-97).

Pursuant to leave granted them by the December 7, 1965, order of the District Court, Voters filed a supplemental complaint on March 8, 1966, challenging the validity of the Seven-Four Plan and seeking an injunction against all elections to be held thereunder (R. 83-87). On April 8, 1966, the District Court held that the Seven-Four Plan did not violate the doctrine of one man, one vote and dismissed the original, amended and supplemental complaints (R. 105-115).

On appeal to the Court of Appeals for the Fourth Circuit, that court reversed on May 30, 1966. While refusing to enjoin the councilmanic election scheduled under general law to be held on June 14, 1966, the Court of Appeals remanded the case to the District Court with instructions to set aside the current apportionment and order an election at large or realign the boroughs so as to equalize substantially their populations if no reapportionment is made at the next session of the General Assembly. It is from this opinion (R. 116-122) and accompanying judgment (R. 123) that this appeal has been taken.

SUMMARY OF ARGUMENT

Contrary to the implication in this Court's order postponing the determination of jurisdiction of this appeal, there can be no doubt about the procedure below. A single district judge properly heard and determined the issues as only a city charter enacted as a state statute of limited application was involved. There is presented here no state statute of state-wide application which is a prerequisite for a three-judge court.

This Court has not previously, and should not now, sanction federal judicial intervention into the manner of election of local governing bodies. Yet, we do not rest our case on this ground alone. The Seven-Four Plan is entirely consistent with the now familiar one man, one vote principles of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), for state legislative apportionment. Every voter has an equal opportunity to participate in the election of all eleven councilmen. Further, the needs of local government require greater flexibility in deviation from strict population-based standards than for state government.

The Seven-Four Plan should be judged not as a pattern of representation but as a tailor-made plan to meet the pe-

culiar needs of Virginia Beach. No other city in this country presents a similar combination of dynamic growth and diverse physical and economic elements in a vast area of 300 square miles. No other constitutional plan can provide for the needs of this city as effectively.

ARGUMENT

I.

This Case Was Properly Heard By A Single District Judge Because The Statutory Grounds For A Three-Judge Court Were Not Met

Pursuant to Voters' original complaint a three-judge district court was convened. That court agreed with Officials that the requisite statutory grounds were not met because the controversy was of a purely local nature and directed the case to be heard by the resident district judge alone (R. 77-78). The controversy presented on the supplemental complaint was also of a local nature and accordingly was heard by the same district judge. In its Order Postponing Jurisdiction entered on January 9, 1967, the Court directed counsel to brief and argue "the question of whether a three-judge court should have been convened" (R. 127).

A three-judge court is required by 28 U.S.C. §2281 when an injunction is sought to restrain on federal constitutional grounds a state officer in the enforcement of a state statute. The purpose of the statute, as carefully articulated in *Cumberland Tel. & Tel. Co.* v. *Louisiana Pub. Serv. Comm'n*, 260 U.S. 212 (1922), was to prevent unnecessary conflict between federal and state authority by depriving a single federal judge of the power to enjoin the regular enforcement of a state statute by requiring full deliberation of so important a matter by three federal judges. The decisions have always treated this as a technical statute to be narrowly construed. For example, in *Phillips* v. *United States*, 312 U.S. 246, 250-51 (1941), this Court said:

> "The history of § 266 [now 28 U.S.C. § 2281], the narrowness of its original scope, the piece-meal explicit amendments which were made to it, the close construction given the section in obedience to Congressional policy, combined to reveal § 266 not as a measure of board social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." (omitting citations of authorities)

The Court has recently reaffirmed this policy of strict construction. See, *e.g.*, *Swift & Co.* v. *Wickham*, 382 U.S.111 (1965); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963); *Bailey* v. *Patterson*, 369 U.S. 31 (1962).

In order to convene a three-judge court in such cases as this, 28 U.S.C. § 2281 requires that two conditions be met. The constitutionality of a state statute of general state-wide application must be challenged and the suit must seek to restrain the action of state officers. Neither condition exists here.

A. The Virgina Beach Charter Is Not a State Statute Within The Meaning Of 28 U.S.C. § 2281

The Seven-Four Plan is a state statute because it is a part of the charter of the City of Virginia Beach granted by the General Assembly of Virginia. But that is not enough. In order to be a state statute within the contemplation of 28 U.S.C. § 2281, the statute must be one of state-wide application rather than one of merely local effect.

This conclusion is compelled by *Rorick* v. *Board of Com'rs*, 307 U.S. 208 (1939). Bondholders of the Everglades Drainage District in Florida sought to enjoin the enforcement of statutes effecting changes in rates and collection of taxes. Since the statutes involved only a single district and did not represent general state-wide policy, this Court held

a three-judge court should not have been convened (307 U.S. at 212):

> "*Ex parte Collins*, [277 U.S. 565] reinforced by *Ex parte Public National Bank*, 278 U.S. 101, authoritatively established the restricted class of cases to which the special procedure of § 266 [now 28 U.S.C. § 2281] must be confined. 'Despite the generality of the language' of that Section, it is now settled doctrine that only a suit involving 'a statute of general application' and not one affecting a 'particular municipality or district' can invoke § 266. Plainly, the matter here in controversy is not one of statewide concern but affects exclusively a particular district in Florida . . . ."

In *Oliver* v. *Mayor and Councilmen*, 346 F. 2d 133 (5th Cir. 1965), the Court of Appeals for the Fifth Circuit held that the statutory charter of the City of Savannah Beach, Georgia, was not a state statute for the purpose of 28 U.S.C. § 2281. Relying squarely on the language from *Rorick* quoted above, that court held that the single district judge properly refused to request the convening of a three-judge court to hear a challenge on constitutional grounds of a charter provision granting nonresident property owners the right to vote in municipal elections. City charters were also held not to be state statutes within the meaning of 28 U.S.C. § 2281 in *Uihlein* v. *City of St. Paul*, 32 F. 2d 748 (8th Cir. 1929), *cert. denied*, 281 U.S. 726 (1930) and in *McMillan* v. *Wagner*, 239 F. Supp. 32 (S.D.N.Y. 1964). To the best of our knowledge, no decision has ever held a city charter to be a 28 U.S.C. § 2281 state statute.

In *Griffin* v. *County School Board*, 377 U.S. 218 (1964), this Court reviewed the granting of an injunction by a single judge forbidding Prince Edward County, Virginia, from paying tuition grants or giving tax credits under a state statute so long as the public schools remained closed to

avoid this Court's school desegregation decisions. The Court stated: "Even though actions of the State are involved, the case, as it comes to us, concerns not a statewide system but rather a situation unique to Prince Edward County." (377 U.S. at 228). The Court held that under the controlling decision in *Rorick* a three-judge court was not necessary and that the single district judge was correct in adjudicating the controversy.

The rule enunciated in *Rorick* that statutes applicable only to a particular locality are not state statutes for the purpose of convening a three-judge court under 28 U.S.C. § 2281 has been recognized in still other cases. See, *e.g.*, *Pierre* v. *Jordan*, 333 F. 2d 951 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965); *Teeval Co.* v. *City of New York*, 88 F. Supp. 652 (S.D.N.Y. 1950). Not a single decision of which we are aware detracts from the applicability of that rule here. The Seven-Four Plan was enacted by Ch. 39, Acts of Assembly of 1966, as an amendment to the Virginia Beach charter. It applies to no other locality. Further, not one of the charters of the 35 other cities or the more than 200 towns in Virginia has a provision for councilmanic elections that resembles the Seven-Four Plan in any respect. There is no way for this Court to hold that a three-judge court should have been convened here without overruling *Rorick*.

B. Those Against Whom The Injunction Is Sought Are Not State Officers

Even where the challenged statute is a state statute of state-wide effect and application, a three-judge court is not proper unless the suit seeks to restrain the action of a state officer in the enforcement of the statute. This Court so held in *Ex parte Public Nat. Bank*, 278 U.S. 101 (1928). There the bank sought to enjoin the receiver and the collector of

taxes of New York City from collecting taxes pursuant to a state statute. The three-judge court held that it had no jurisdiction to hear the controversy because neither defendant was a state officer and the suit involved only the action of city officials in the collection of taxes for the use of the city.

The point is forcefully illustrated by the following language in *City of Cleveland* v. *United States*, 323 U.S. 329, 332 (1945):

> "The section is inapplicable to suits challenging local ordinances or statutes having only local application. But these cases involve state law the application of which is state-wide. If the taxing officials were, in these instances, though acting under such a law, doing so as local officials and on behalf of the locality and not as officers of the State, the section is inapplicable to suits to restrain them . . . ."

The only injunctive relief sought by the supplemental complaint was that the defendant members of the Electoral Board of the City of Virginia Beach and other election officials be enjoined from printing ballots or holding elections pursuant to the Seven-Four Plan (R. 86). That these defendants are local rather than state officials is too obvious for argument. Thus, a three-judge court would not have been proper even if the charter were a state statute within the meaning of 28 U.S.C. § 2281.

II.

Apportionment Of Local Governing Bodies Is Beyond The Scope Of The Equal Protection Clause

Neither *Baker* v. *Carr*, 369 U.S. 186 (1962), nor any subsequent decision of this Court has decided or suggested that intervention of the federal judiciary is proper in ap-

portionment of governing bodies below the level of state legislatures. Several state and federal courts have done so by applying to city councils, county boards of supervisors and school boards the one man, one vote principle of *Reynolds* v. *Sims*, 377 U.S. 533 (1964). But other courts have respected our dual system of government by holding that the United States Constitution does not require the apportionment of local governing bodies in accordance with population. Decisions of this Court suggest, if not compel, the conclusion that this is the proper approach.

The tens of thousands of political subdivisions of the several states have no inherent sovereignty. As creatures of the state they are subject to complete control by its legislature. So long as the people are afforded equality of representation in the legislature, the requirements of the Equal Protection Clause have been fulfilled. This conclusion draws strong support from Mr. Chief Justice Warren speaking in *Reynolds* (377 U.S. at 575):

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.' . . ."

A state legislature, in the exercise of its authority over units of local government, could provide, without violating

the Constitution, that local officials be appointed rather than elected. Such is the clear implication of *Fortson* v. *Morris*, 385 U.S. 231 (1966), where this Court held that there is no provision in the Constitution which either expressly or impliedly dictates the method a state must use in selecting its governor. Mr. Justice Black, in discussing *Gray* v. *Sanders*, 372 U.S. 368 (1963), said (385 U.S. at 233):

> "Not a word in the Court's opinion indicated that it was intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly."

It is illogical to say that the legislature can appoint members of a local government, but if the members are to be elected, cannot determine the standards of election or the manner in which the members shall be elected.

The Equal Protection Clause does not require federal judicial intervention in this case.

III.

The Seven-Four Plan Is Consistent With The One Man, One Vote Mandate Of The Equal Protection Clause

Should this Court determine that apportionment of local governing bodies comes within the scope of the Equal Protection Clause of the Fourteenth Amendment, the Seven-Four Plan is sustainable on either of two grounds. First, the plan is consistent with the one man, one vote principles of *Reynolds* v. *Sims*, 377 U.S. 533 (1964) for state legislatures. But it is not necessary that the plan conform to those standards because the needs of local government require that this Court permit greater flexibility in the apportionment of local governing bodies than state legislatures.

A. The Seven-Four Plan Accords With The One Man, One Vote Standard Formulated In Reynolds v. Sims.

The message of *Reynolds* v. *Sims; supra*, and the related state legislative apportionment decisions is that the Equal Protection Clause of the Fourteenth Amendment guarantees to each voter an equally effective voice in the election of the state legislature. To achieve this end, population must be the controlling factor.

The Seven-Four Plan accords with this standard. All councilmen are elected by all of the city voters and represent all of its people. Inherent in the opinion of the Court of Appeals is the erroneous conclusion that the seven resident councilmen represent the boroughs in which they reside. That court refused to acknowledge that these councilmen represent the entire city. Yet, so long as election depends on the vote of the city as a whole, a residence requirement cannot change the city's councilman to the borough's councilman. The point is illustrated in *Fortson* v. *Dorsey*, 379 U.S. 433, 438 (1965), where, in upholding a residence requirement for the election of state senators from a multi-district county, Mr. Justice Brennan stated:

> "It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-districts counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator . . . ."

In *Fortson* a three-judge district court held unconstitutional a Georgia statute requiring county-wide voting in counties having plural senatorial districts. In reversing, this Court held the plan valid because the weight of each vote was substantially equal (379 U.S. at 438):

> "If the weight of the vote of any voter in a Fulton County district, when he votes for seven senators to represent him in the Georgia Senate, is not the exact equivalent of that of a resident of a single-member constituency, we cannot say that his vote is not 'approximately equal in weight to that of any other citizen in the State.'"

Unlike Virginia Beach, there was substantial equality of population in the Georgia senatorial districts. This fact, standing alone, does not invalidate the Seven-Four Plan.

Prior to this Court's decision in *Fortson*, the same three-judge court which decided *Fortson* upheld the validity of county-wide election of the five county commissioners in DeKalb County, Georgia, under a statute providing that four of the five must reside in the districts from which they offer for election. *Reed* v. *Mann*, 237 F. Supp. 22 (N.D. Ga. 1964). It was contended that representative government would not tolerate the possibility that the will of the district be defeated by the county-wide vote but the court disagreed (237 F. Supp. at 24):

> "The teachings of Gray v. Sanders, supra, is to first determine the geographical unit, and then to see if the voters in the unit are treated equally. This is the one-man one-vote admeasurement. The political unit here involved is DeKalb County, and it is plain that every voter in the county is treated equally."

Here the political unit is Virginia Beach. Since every voter has one vote for each of eleven councilmen, every voter within the city is treated equally.

Multi-member districts were also considered in *O'Shields* v. *McNair*, 254 F. Supp. 708 (D.S.C. 1966). The South Carolina Reapportionment Act guaranteed resident senators to some counties in multi-member districts by providing that one of two senators must reside in each of the district's counties which differed sharply in population. No such protected right was accorded other counties of more than twice the size. In discussing the related problem of ward residential requirements in at-large councilmanic elections that court said (254 F. Supp. at 714):

> "We are also aware of the fact that a number of municipalities in this state elect their councils under ward-residence rules. Each electoral contest is framed by opposition between residents of the same ward, but the election is determined by the results of city-wide voting. We may assume that in some of those cities, particularly those which have been operating under that system for a long time, some wards may vary greatly in poulation.
>
> "We may also assume the general constitutionality of such municipal electoral schemes, but that does not dispose of the present problem. . . ."

Ward residence requirements for at-large election of city councilmen are not uncommon. There are at least 56 cities with a population in excess of 5,000 in 22 different states having such requirements. Municipal Year Book, p. 93 (International City Managers Association, 1966). While we do not know the relative population of the wards in those cities, we may assume, as did the court in *O'Shields*, that they vary greatly in population.

B. Less Rigid Apportionment Standards Should Be Applied To Local Governing Bodies Than To State Legislatures

The Court of Appeals erred when it held that *Reynolds* prohibits the consideration of *any* factors other than population. This conclusion misses in part the teaching of that decision (377 U.S. at 560-61):

> "Nevertheless, Wesberry clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures."

The Court expressly recognized that there may be *some* deviation from population factors (377 U.S. at 580):

> "Citizens, not history or economic interests, cast votes. Considerations of area *alone* provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid 1960's, *most* claims that deviations from population-based representation can validly be based *solely* on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, *for the most part*, unconvincing." (Emphasis added)

Several lower court decisions have also recognized that departures from the population standard will be permitted where there is specific proof justifying the deviation. See *Ellis* v. *Mayor and City Council of Baltimore*, 352 F. 2d 123, 126 (4th Cir. 1965) and *O'Shields* v. *McNair*, 254 F. Supp. 708, 712-13 (D.S.C. 1966).

Less rigid standards for local apportionment are forecast by *Reynolds*. In implementing at the state level the principles set forth for congressional representation in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), the Court declared that "distinctions may well be made between congressional and state legislative representation" and, accordingly, "somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment" (377 U.S. at 578).

While the Court in *Reynolds* rejected the consideration of factors other than population, such as the history or individual characteristics of a state, the reasons for doing so in the state cases are not convincing here. State governments number 50. Their powers and problems are similar—taxation, education, public roads, mental hospitals, conservation of natural resources, etc. Local government, on the other hand, presents the broadest imaginable spectrum. Their governing bodies number in the tens of thousands and differ widely in powers and responsibilities. They include counties, cities, townships, metro governments, school districts, hospital districts and planning commissions. They include units of both limited and broad legislative powers. And units of the same name may have different functions from state to state. For example, in Virginia a county exercises substantially all governmental powers except for maintenance of roads, while in Alabama a county has few powers other than maintenance of roads.

We do not advocate that the Court discard population as the controlling factor. We simply say that the Equal Protection Clause as applied to local governing bodies should be interpreted to require a rational system responsive to local conditions while preserving a representative form of government subject at all times to the will of the majority. What may be constitutional for Virginia Beach may be entirely unacceptable for Richmond. But the straight jacket imposed by the opinion below by an automatic application of mathematical precision must be removed.

C. The Seven-Four Plan Provides The Most Effective and Most Representative Form of Government for The Needs of All The Citizens of The City

The Virginia Beach city council in proposing the Seven-Four Plan considered three approaches to representation—traditional at-large elections without regard to residence, election by and from wards or boroughs of substantially equal population and at-large elections with a residential requirement. Either of the first two methods, although passing all constitutional tests, would produce bizarre results at Virginia Beach.

As pointed out in a recent annotation, traditional at-large elections promote the denial of minority interests. Annotation, "Inequalities in Population of Election Districts or Voting Units as Rendering Apportionment Unconstitutional," 12 L ed 2d 1282 (1965). This is true whether the minority interests are those of race or political party or, as in this case, those of the sparsely settled rural areas. At Virginia Beach the boroughs of Lynnhaven and Bayside or Lynnhaven and Kempsville could elect all eleven councilmen. This might not be significant in the average city where all of its problems are apt to be essentially urban in nature. But with

its 300 square miles consisting of relatively small urban centers, extensive suburban development and vast agricultural and undeveloped areas, Virginia Beach is unique. This rapidly growing and changing new city cannot afford to take the chance that none of its councilmen will be familiar with its major industry and the related problems of the rural sections which comprise more than half its area.

As pointed out in the above annotation, ward elections solve these problems but create others (12 L.ed 2d at 1282):

> "Districting—the election of representatives from various districts—overcomes these disadvantages of at-large elections, and from the very beginning of our nation has been used at all levels of government, national, state, and local. While overcoming these disadvantages, however, districting raises the complicated question of how the total territory should be apportioned, or districted."

It is for this very reason that the council considered—and rejected—strict ward or borough elections for Virginia Beach (R. 103). For example, one substantial subdivision may drastically alter the distribution of population among voting districts within a short time. When we realize that two boroughs experienced population increases of 60% in just four years, it is easy to understand why such a system would not be suitable here. Ward elections just cannot keep up with demographic changes at Virginia Beach.

The Seven-Four Plan overcomes these objections to the traditional at-large and ward elections by combining the best elements of both systems. That plan insures a free and effective vote for all while permitting an intelligent expression on the council of views relating to every phase of the city's varied life. The city fathers deemed it essential to insure that some members of the council be familiar with agricul-

tural and rural problems (R. 92-94). The fundamental fairness of the Seven-Four Plan is illustrated by excerpts from the District Court opinion:

> "The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area. . . . (R. 111)
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> * * *
>
> ". . . the history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wise cities in the United States. . . ." (R. 113-14)

This is not the typical case in which areas having unequal population have the same amount of representation, thus giving one vote in the smaller area greater value than one vote in the larger area. Under the Seven-Four Plan, there is no such dilution of votes. Every vote in Virginia Beach counts equally since all candidates are elected by a city-wide vote. As the District Court specificially found, the city has been reapportioned in an intelligent and realistic manner (R. 114):

> "The 'Seven-Four Plan' is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. . . .

"The fact that three of the eleven council members must come from the less populated boroughs does not, standing alone, amount to invidious discrimination where they are elected by the voters of the entire city."

CONCLUSION

While the original plan of councilmanic representation at Virginia Beach permitted 22% of the people to elect eight of eleven or 73% of the councilmen, the Seven-Four Plan places the council under the control of the majority of the people. At the same time this plan offers qualities deemed essential for this unique city which no other constitutional plan can provide.

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed and the judgment of the United States District Court for the Eastern District of Virginia affirmed.

Respectfully submitted,

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